In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 590

RALPH J. PERK,
Cuyahoga County Auditor,
Appellant,

vs.

THE STATE OF OHIO, ON THE RELATION OF
JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
Appellee.

MOTION TO DISMISS OR AFFIRM ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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QUESTIONS PRESENTED

The appellee suggests that the correct wording of the questions presented in the light of the facts of the case in the Supreme Court of Ohio are as follows:

1. Is a registered voter denied his right "peaceably to assemble and to petition the Government for a redress of grievances" and the electorate as a whole denied the right to vote by the requirement that voters designate their ward and precinct on a referendum petition which seeks to reject the adoption of a permissive county tax by a board of county commissioners?

2. Is a registered voter denied "equal protection of the laws" when Sections 3501.01 and 3513.18 Ohio Revised Code require a voter living in a designated ward and precinct to place, or cause to be placed by another on a referendum petition authorized by such statute, the ward and precinct of the signer?

STATUTES INVOLVED

Ohio Revised Code Sections 305.31 and 305.32 as they were worded at the time the case at bar was considered by the Ohio Supreme Court are relevant. Ohio Constitution Article II Section 1g is not involved and the Ohio Supreme Court held that it need not be decided in this case whether or not Section 1g pertains to referendum only. The proposed referendum in the case at bar is a county wide referendum which depends upon the specific statutory authority of R.C. 305.31 and 305.32. The Supreme Court Ohio referred to the Ohio Constitutional provision primarily because both the constitutional provision and the statute R.C. 305.32 contain the ward and precinct requirement.

STATEMENT

The appellee accepts for the most part the statement of facts and statement of the case set forth by the appellant.

However it should also be noted that the appellant the County Auditor of Cuyahoga County, Ohio in his actions in the matter disregarded Section 309.09 of the Revised Code of Ohio which designates the Prosecuting Attorney as the legal advisor of all county officers and boards. The appellant who is not an attorney at law took upon himself the performance of the serious legal step of rejecting signatures which umimmediately and precisely without consulting the Prosecuting Attorney. This is especially significant in view of the fact that Section 305.31 of the Revised Code of Ohio adopted in December 1967 is a provision unique in Ohio law conferred upon the County Auditor the duty of determining the validity of referendum petitions filed against county permissive taxes and that was the first time that the County Auditor had

occasion to act under the new law. When the Prosecuting Attorney received information as to the aberration of the County Auditor, the latter was informed in writing (delivered to him personally by two assistant prosecuting attorneys including the writer) on May 2, 1968 that he should cease and desist from any plan under which he would engage in the expenditure of time or money in the counting of signatures which did not include the ward and precinct of the signers. The writing further informed the appellant County Auditor that such a counting would be an illegal expenditure of public funds. The record is devoid of any response by the County Auditor, such as is claimed in the last full paragraph on page 4 of the Jurisdictional Statement, and the fact is that no such response was ever made. There was defiance but no rationale.

It is noteworthy that although the dissenting opinion consisted two justices of the Supreme Court of Ohio occupies about four times as much space as the per curiam opinion by five concurring justices, neither of the dissenting opinions even suggests the slightest belief that the ward and precinct requirement contravenes the United States Constitution.

INSUBSTANTIALITY OF THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED

The appellant has injected an element of confusion into the consideration of the subject matter of the case at bar by repeatedly referring to Article II, Section 1, of the Ohio Constitution. The fact is that the said constitutional provision relates to a statewide referendum on state statutes. No statewide referendum is concerned in the case. Rather, the legislature of Ohio saw fit, in enacting county permissive taxes, to provide, in addition to the constitutional referendum provided on the statute itself

for a county referendum to be undertaken in timely fashion after adoption of such a permissive tax by a board of county commissioners. It is submitted that there is no constitutional requirement for a county-wide referendum on a county permissive tax.

The appellant has complained (pages 7 and 11 of the Jurisdictional Statement) that the appellee never suggested to the Ohio Supreme Court any purpose for requiring that wards and precincts be designated by signers of referendum petitions. The fact is that there was no necessity to cite or argue a purpose for the requirement to a Court which had three times in the past 30 years decided that ward and precinct designations must be placed on referendum petitions whether it be done by the signer himself or by someone else at his direction and with his authority. *State ex rel. Patton v. Myers*, 127 Ohio St. 93, 186 N.E. 817 (1933); *Poor v. Ashland*, 132 Ohio St. 187, 6 N.E.2d 418 (1937); *Lynn v. Staggs*, 166 Ohio St. 151, 140 N.E.2d 663 (1957). It was not necessary to argue purpose to the Supreme Court of Ohio which had so aptly observed in *Lynn v. Staggs*, 166 Ohio St. 151, 140 N.E.2d 663, at page 168 of the Ohio State Reports:

> Many of the formalities required with respect to referendum petitions (such as the date of signing, the place of residence and ward and precinct of the signer and the certificate and affidavit of the circulator) are designed not merely to obviate fraud but probably principally to help in the checking of the petition by facilitating the identification of the signers and a determination of their qualifications.

The appellant argues at page 8 that the Board of Elections of Cuyahoga County had the information as to wards and precincts in its own records. This is no plea that no purpose is to be served by requiring a peti-

tion signer to include this information. The argument overlooks the fact that there is a population of approximately 1,800,000 in Cuyahoga County, there are 58 municipalities and 9 townships within the county with many duplications of street names and personal names from municipality to municipality, and the law (R.C. 3503.22) does not require that the name of the municipality be designated on the referendum petition or even permit it to be placed thereon. The argument suppresses the fact that the state statutes of Ohio are designed to apply uniformly to eighty-eight (88) counties. To say that the law should apply in a different way in Cuyahoga County, simply because the board of elections of the said county may voluntarily have been able to install more specialized record keeping than other counties enjoy, would be a real discrimination and denial of due process in regard to Cuyahoga County and the other 87 counties of the state, a clear violation of the principle of uniform application of the laws.

The argument also ignores the fact that opponents of a referendum movement must be given a fair opportunity to check on the validity of signatures. The designation of wards and precincts has a salutary effect in identifying signers for this purpose. Likewise Ohio recognizes that signers may withdraw their signatures from referendum petitions until such time as official action has been taken thereon. *State, ex rel. Kahle v. Rogers, Auditor*, 99 Ohio St. 11, 122 N.E. 39 (1918). If a signer's signature is to be withdrawn, its identification by ward and precinct eases the problem especially when it must be identified among 10,000 signatures. Referendum is not a one-way street. The opponents of a referendum, as well as the proponents, are entitled to have their interest reasonably protected by the state.

Not a single one of the citations in the appellant's Jurisdictional Statement stands for any proposition remotely resembling interference with a State's constitutional or statutory provisions as to informational material required on an initiative or referendum petition. It would appear that this deficiency in the Jurisdictional Statement is not accidental or due to lack of diligence. The United States Supreme Court has amply demonstrated its concern for the need to refrain from usurping the authority of the States in areas traditionally entrusted to them. *Green v. County School Board*, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968). Writing for a unanimous court in *Lassiter v. Northampton County Election Board*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072, upholding, against constitutional attack, North Carolina's literacy requirement applicable to voters in all state and federal elections, Justice Douglas said:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope v. Williams*, 193 U.S. 621, 633, 24 S. Ct. 573, 576, 48 L. Ed. 817; *Mason v. Missouri*, 179 U.S. 328, 335, 21 S. Ct. 125, 128, 45 L. Ed. 214, absent of course the discrimination which the Constitution condemns." 360 U.S., at 50-51, 79 S. Ct. at 989.

In the case at bar, no invidious discrimination exists. No one is penalized on the basis of age, race, sex, color, religion, economic status, taxpaying status, or on the basis of having, or not having, a child in school.

The appellant's contentions spring very largely from a false premise. There is a factual error in the first sentence of the paragraph numbered one (1) on page 7 of the Jurisdictional Statement. A like assertion near the end of page eleven (11) of the Jurisdictional Statement that no one knows his ward and precinct designations is

likewise erroneous. It was not stipulated at bar that the electors in Cuyahoga County do not know the number and/or name of the ward and precinct in which they live. Even if many voters are not able at some particular time and without checking with their friends and neighbors, to state their ward and precinct, there was no allegation or evidence that even a single one of the 76,000 signers of the referendum petitions in the case at bar did not know his ward and precinct. Lack of knowledge is no excuse, any more than lack of literacy is an excuse. The referendum drive was a vast promotional effort, guided by a former United States congressman. In such a situation Ohio's liberal rule of permitting the circulator or other persons to place the ward and precinct designation on the petition, *State, ex rel. Patton v. Myers*, 127 Ohio St. 93, lays the blame for omission squarely at the door of the promoters of the referendum drive.

All in all, the case at bar, at the very utmost, falls within the rule noted by Justice Black in the opinion in *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d. 24, 89 S. Ct. 5 (1968), when he said, at page 31 of the Lawyers' Edition:

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitutions."

CONCLUSION

In view of the want of any substantial federal question, the appeal of the County Auditor should be dismissed or the judgment of the Supreme Court of Ohio should be affirmed, and the appellee so moves this honorable court. In addition to the arguments set forth above, it is submitted that there is a large element of mootness in this case. The constitutionality of Ohio's permissive "piggyback"

tax has withstood an onslaught in the U.S. District Court for the Northern District of Ohio and in the Common Pleas Court of Cuyahoga County. The tax went into effect on September 1, 1969, and is being collected at a rate of more that one million dollars ($1,000,000) per month.

Furthermore, it is clear that a decision by this Court on the subject of ward and precinct designations is not needed as a controlling precedent for future cases in Ohio involving county permissive taxes. The General Assembly of Ohio enacted into law an amendment of R.C. 305.32, effective August 18, 1969, which eliminates the words "and the ward and precinct, if any."

Respectfully submitted,

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